Chicago-Kent Law Review

Volume 74
Issue 1 *Symposium on Commemorating the Two Hundredth Anniversary of Chancellor Kent's Ascension to the Bench*

Article 2

December 1998

Foreword: The Legacy of Chancellor Kent

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FOREWORD: THE LEGACY OF CHANCELLOR KENT

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This symposium commemorates the two hundredth anniversary of James Kent's ascension to the bench. Few other figures in our nation's history have captured the legal imagination to the same extent as Kent.[1] As professor, judge, and author, Kent devoted his life to law and pedagogy, and his work profoundly shaped the course of law in the new Republic. His mammoth treatise on American law, Kent's *Commentaries*, not only was the first full-fledged effort in this country, but also was the most extensively used throughout the nineteenth century, and is still widely cited today. Kent's *Commentaries* carved out space for the emergence of a uniquely American law, yet one built firmly upon the English common law tradition. His institution of the reporting system in New York set the standard that other states emulated, helping to make law a more learned profession. His efforts to ensure judicial independence blazed an enduring path for state court judges between the Scylla of federal court expansion and the Charybdis of state political controls.

This law school honors Kent's memory through its name. The late nineteenth century witnessed a dramatic expansion in the number of law schools as the apprenticeship model of legal education lost support and as the demand for part-time education increased. Law school became an avenue not merely for those wishing enhanced education, but also for those wishing social and economic mobility.[2]

In 1892, Professor Marshall Ewell left Northwestern to start a new school, in part because he believed that Northwestern failed to focus sufficiently on preparing students for legal practice.[3] The invocation of Kent's name reinforced Ewell's firm conviction of the

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1. John Marshall is the exception. To commemorate the one hundredth anniversary of his ascension to the bench, a national celebration was planned and a "John Marshall" day proclaimed. *See* Susanna L. Blumenthal, *Law and the Creative Mind*, 74 CHI.-KENT L. REV. 151, 208-11 (1998).

2. *See* ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S, at 73-84 (1983).

3. *See* Milton O. Naramore, Secretary's Report, *in* CHI. LEGAL NEWS, June 2, 1894, at 634.

lasting power of the legal method reflected in Kent's *Commentaries*.[4] Many other law schools of the era were named after leading historical figures. In addition to Kent and John Marshall, schools were named after Andrew Jackson,[5] Abraham Lincoln,[6] and John M. Langsten.[7] The Kent College of Law merged with the Chicago College of Law in 1900, and the combined schools became a critical training ground for Chicago's bustling population of immigrants. In addition, the school was among the first to open doors to African Americans and women.

This school has flourished, even while schools named after Jackson, Neal, Langsten, and even John F. Kennedy[8] have either merged with others or closed their doors. Demographics, finance, and strategic planning undoubtedly determined which law schools survived; and, indeed, the Kent College of Law in Nashville closed its doors in 1940.[9] But perhaps it is not too whimsical to suggest that Kent's name may have played a role as well in the longevity of this school. The Kent name brings universal respect: two other universities, Columbia and Yale, have named prestigious chairs in his memory.

The articles in this symposium address many different legal issues, as is only fitting given Kent's wide-ranging interests and profound influence on the development of the law. Chief Judge Judith S. Kaye of the Court of Appeals of New York, who occupies the same position as did Chancellor Kent almost two hundred years ago, contributes a delightful biographical sketch.[10] The article focuses on the development of Kent's legal practice and legal outlook. She focuses on his establishment, while he was on the bench, of a reporter system for New York Supreme Court cases; his opinions on equity as Chancellor; and his work on his famed treatise. Relying on primary source material, the article illumines the course of a giant in

4. Ewell focused the new school's energies on blending theoretical and practical training. *See* Marshall D. Ewell, *Kent College of Law*, 6 BENCH & BAR 638, 639 (1896).

5. *See* STEVENS, *supra* note 2, at 201 n.31.

6. *See* ALFRED ZANTZINGER REED, TRAINING FOR THE PUBLIC PROFESSION OF THE LAW 429 (1921). One school named for Lincoln was located, appropriately enough, in Springfield, Illinois. *See id.* Others were in Pennsylvania and elsewhere in Illinois. *See id.* at 425-29.

7. The Langsten Law School was part of Frelinghuysen University in the District of Columbia and attracted African-American students. *See* STEVENS, *supra* note 2, at 195. Langsten was a distinguished educator in the latter half of the nineteenth century.

8. The John F. Kennedy law school was located in California. *See id.* at 244.

9. *See id.* at 201 n.31.

10. *See* Judith S. Kaye, *Commentaries on Chancellor Kent*, 74 CHI.-KENT L. REV. 11 (1998).

American legal history.

Three of the symposium contributions focus on judicial independence. As a member of the New York Supreme Court and former state representative, Kent was zealous in defending the independence of the judiciary.

In a jointly authored article,[11] Emily Van Tassel and Charles Geyh focus on the contemporary history of one aspect of the judicial independence that Kent cherished: the judiciary's structural independence in the face of encroachments from the legislative and executive branches that could have undermined the judiciary's ability to perform a valuable checking function.[12] The authors start in the period during the Revolutionary War, which they and others have argued was marked by excessive judicial dependence on the newly independent state legislatures. Judges escaped the control of the Crown only to become subservient to the legislatures. During that period, judges were subject to salary cuts and often could be removed upon vote of the state legislature. The authors next show how these concerns underlay much of the debates during the Constitutional Convention that ultimately led to enactment of the familiar Article III tenure and salary protections. They suggest that the delegates did not address other potential problems, such as congressional regulation of jurisdiction, simply because they could not have foreseen future legislative incursions on judicial independence.

The authors then address the tensions that arose in the new Republic after enactment of the Judiciary Act of 1789. Creating inferior federal courts was not seen as a means of regulating the judiciary so much as a way to counteract the power of state courts when federal interests were at stake. Moreover, judges during that period recognized potential threats to their structural independence stemming from circuit riding duties, imposition of administrative duties under the 1792 Invalid Pension Act, and finally President Adams' court-packing plan of 1801. The authors conclude that the early history of our Republic affords no ammunition to those intent

11. *See* Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31 (1998).

12. Oddly enough, New York at the time had a Council of Revision under which the Chancellor of Equity sat with the Governor of New York and members of the supreme court to review all bills enacted by the state legislature to ensure not only that the bills were constitutional but also that they were "consistent with the public good." *See* John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 563 (1993). New York abolished the Council in 1821, but Kent apparently did not strenuously object to its composition or duties. *See id.*

on limiting the judiciary's structural independence today.

Michael Gerhardt examines Chancellor Kent's view of judicial independence with respect to the conditions under which judges can be impeached.[13] Surprisingly, Kent believed judges could be impeached for improvident opinions. He wrote that the impeachment mechanism represented a critical check on judicial abuse of authority. How, Professor Gerhardt asks, can that view on impeachment be squared with Kent's overall view of the importance of the judiciary's structural independence?

Gerhardt locates the answer, interestingly enough, in Kent's evident assumption that the law of impeachment would develop in a common law type fashion. Over time, principles as to when and why impeachment proceedings could proceed would crystallize, limiting Congress's ability to use impeachment as a means to undermine judicial independence. Gerhardt examines judicial impeachment cases in an effort to determine why no common law rules have arisen delineating the actus reus and mens rea elements of impeachment. The political nature of impeachment, in tandem with the paucity of cases in our history, have prevented any such rules from emerging. Ultimately, Gerhardt argues, Kent must have believed that judicial review itself would be available to restrain any legislative abuse of the impeachment remedy.[14] That expectation has not materialized during the admittedly sparse history of impeachment proceedings.

Erwin Chemerinsky investigates another obstacle facing judicial independence, namely, the corruption intrinsic to the electoral process.[15] Although Kent never had to face an election, the vast majority of judges today confront the necessity to raise money and win elections. Chemerinsky notes first that state court judges must rely upon campaign contributions to fund elections, whether conventional adversary contests or retention elections. The money comes from lawyers who will appear before the judges or from firms whose interests the judges will consider. The impact upon the decisional impartiality that Kent valued so highly can be devastating. Chemerinsky concludes, therefore, that campaign restrictions should

13. *See* Michael J. Gerhardt, *Chancellor Kent and the Search for the Elements of Impeachable Offenses*, 74 CHI.-KENT L. REV. 91 (1998).

14. *See also* Nixon v. United States, 506 U.S. 224 (1993) (refusing to consider Judge Nixon's assertion that the Senate violated the Constitution in delegating his impeachment trial to a committee).

15. *See* Erwin Chemerinsky, *Preserving an Independent Judiciary: The Need for Contribution and Expenditure Limits in Judicial Elections*, 74 CHI.-KENT L. REV. 133 (1998).

be imposed on judicial elections, and that the Supreme Court should uphold both expenditure and contribution restrictions against First Amendment attack given the compelling state interest in judicial impartiality.[16] No other means, whether case-by-case recusal or disclosure requirements, Chemerinsky argues, can as effectively minimize the potential and appearance of corruption.

Susanna Blumenthal addresses not the question of judicial independence but of judicial reputation in the nineteenth century.[17] Conventional wisdom suggests that judges at the time were viewed as law finders, not makers. Independence was required to ensure that the judicial craft be pursued faithfully, if mechanically. Blumenthal shatters the notion that judges were perceived so narrowly. Drawing upon legal pamphlets, judicial biographies, and eulogies as her primary sources, she argues that judges, at least by the middle of the nineteenth century, were respected and lauded for their creativity in applying doctrine. She suggests that society in this early period of our history viewed judges through a lens of romanticism, a movement prevalent in the literature and music of the period. Judges were not regarded merely as ciphers or as mechanical interpreters of the law, but rather lionized as enlightened lawmakers. The judicial craft permitted and even encouraged innovation and creativity. Kent indeed became a role model against which to assess other judicial lives.

Two contributions focus on Kent's pivotal role in disseminating legal information more widely. Kent was highly influential in setting in motion a reporting system for state supreme court cases which not only made the opinions available to more attorneys, but also created an incentive for judges to write more learned opinions. Moreover, his treatise helped spread legal information by collecting and analyzing such extensive legal authority in one publication,[18] just as Blackstone had done with English law.

G. Edward White examines the unparalleled success of the *Commentaries* to capture the public's imagination and pocketbooks in the nineteenth century.[19] After all, Justice Holmes, even while

16. The Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), frames the proper inquiry, and only a showing of compelling state interest can save the constitutionality of any such restriction.

17. *See* Blumenthal, *supra* note 1.

18. The *Commentaries* were wildly popular by the standard of the day and may have earned more money than any other book during the middle of the nineteenth century. *See* Langbein, *supra* note 12, at 566.

19. *See* G. Edward White, *The Chancellor's Ghost*, 74 CHI.-KENT L. REV. 229 (1998).

preparing the twelfth edition of the *Commentaries*, quipped that Kent "has no general ideas, except wrong ones,"[20] and many commentators today agree. White presents several examples in the *Commentaries* that reflect what we would consider to be "wrongheadedness" or worse.

Nonetheless, Kent's influence was widespread and the *Commentaries* were revered for several generations after his death.[21] White suggests that, contemporary sensibilities notwithstanding, Kent excelled in combining an ability to present the law as it was with refined commentary drawing upon divergent legal sources from all over the world. Kent's *Commentaries* succeeded not only because the treatise pulled extensive legal materials together in one publication, but also because Kent lent the materials such thoughtful analysis, even if the analyses are ones that we would reject today as superficial or result-oriented. Kent reserved for the legal commentator a critical role in stating what the law was and then in refining the law. His commentary could improve the emerging American law consistent with developing mores of the era without exposing the political nature of judging. His role as treatise writer fell within the didactic traditions of academicians or savants from other disciplines. What distinguished Kent from other writers therefore was his ability to make his *Commentaries* synonymous with the emerging American law itself.

Denis Duffey focuses on the innovation of the printed case report.[22] He argues that the impetus for case reporting arose from two reform efforts internal to the judiciary: first, the desire to make clear the differences between common law in the States and that in England; and second, the goal of making judicial decision making in the new states more uniform.

Duffey then argues that, despite the original impetus, case reporting provided an unanticipated defense of common law authority in the face of republican sentiment.[23] Many leaders of the time identified the common law with England and therefore were suspicious of its continued role in the new Republic. Printed decisions

20. *Id.* at 226.

21. When The Chicago College of Law was formed, which would soon merge with the Kent College of Law, Kent's *Commentaries* were required reading. *See* CHICAGO COLLEGE OF LAW, ANNUAL CATALOGUE 1889–90, at 8 (1889).

22. *See* Denis P. Duffey, Jr., *Genre and Authority: The Rise of Case Reporting in the Early United States*, 74 CHI.-KENT L. REV. 263 (1998).

23. *See also* Langbein, *supra* note 12, at 567-68.

led to greater transparency. Editorials were written, and judges attacked for their decisions. The very debate, however, lent the impression that common-law making was subject to wider public participation and in fact could be shaped by civic discourse. Moreover, the printed reports afforded the legal profession a common American literature for the first time, thereby enhancing respect for the profession. Thus, increased case reporting helped insulate the common law tradition from possible legislative reformist efforts and afforded judges more legitimacy in the public eye.

Finally, in an afterward,[24] Penny White reflects upon the judicial qualities that Kent manifested in office.[25] Foremost, she argues, Kent was a judge of integrity, refusing to be drawn into partisan disputes despite the possibility for future advancement. She also avers to his tremendous learning and intellectual acumen. His lectures and opinions reveal a great breadth and depth of knowledge. In addition, she addresses, as does Professor G. Edward White, Kent's gift of communication, both in his opinions and in his *Commentaries*. White also stresses Kent's commitment to the profession. He labored arduously and effectively to enhance the prestige and competence of both the New York Supreme Court and Court of Chancery. She concludes that "Chancellor Kent was the paradigm of a good judge.... His legacy for today's judges is to set the bar which they should all aspire to scale."[26]

The contributions to this symposium reflect Chancellor Kent's varied talents as well as his profound influence on the development of American law. Kent's legacy rests with his treatise, with his successful efforts to introduce a professional reporting system, and with his erudite judicial decisions. This school proudly bears his name and strives to combine his interest in legal pedagogy with his pioneering efforts to disseminate legal information more widely.

24. Professor White, former Associate Justice of the Tennessee Supreme Court, delivered these remarks at a colloquium honoring Chancellor Kent. Also participating were Larry Lessig and G. Edward White.

25. *See* Penny J. White, *Master, Justice, Chancellor Kent: His Legacy for Today's Judges*, 74 CHI.-KENT L. REV. 277 (1998).

26. *Id.* at 274-75.